

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES OF AMERICA** :  
 :  
 **v.** : **Case No. 1:21-cr-00708-RCL-1**  
 :  
 **LEO CHRISTOPHER KELLY,** :  
 :  
 **Defendant.** :

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT’S  
MOTION IN LIMINE, ECF 50**

The Court should deny Defendant Leo Christopher Kelly’s (“Kelly”) Motion in Limine, ECF 50 at 1, to preclude “mention[ing] or allud[ing] to,” (1) news reports of the deaths police officers during or after January 6, 2021, (2) references to former President Trump’s “stop the steal” law suits, other challenges to the 2020 election, or challenges to the House Select Committee’s subpoena to testify regarding the events surrounding January 6, (3) reference or information regarding “the proud boys, patriot boys, three percenters or oath keepers[,]” (4) photographs recovered from Kelly’s phone that are irrelevant, “(5) Kelly’s arrest photograph, also known as, “mug shot,” and (6) references to other areas of the Capitol that were breached in which Kelly was not located. The Court should deny this motion because, with the exceptions noted below, evidence in the form of witness testimony, closed-circuit video footage, and Kelly’s interviews with an Internet news site and later custodial interview with Federal Bureau of Investigations (“FBI”) agents establish the failure of the former President’s lawsuits was an animating factor in Kelly’s motivation to breach the Capitol and Kelly’s own words paint a picture of the chaos inside the Capitol that extended far beyond the Senate Fire Door he entered or the Senate chamber that he occupied and is therefore relevant and not unduly prejudicial evidence under Federal Rules of Evidence 401 and 403.

## **BACKGROUND**

### **A. Relevant Procedural History**

On January 16, 2021, the Court issued a criminal complaint that charged Kelly with violating 18 U.S.C. §§ 1752(a)(1) and (2) (knowingly entering or remaining in any restricted building or grounds without lawful authority) and 40 U.S.C. §§ 5104(e)(2)(A), (C), and (G) (violent entry with intent to disrupt the orderly conduct of official business and disorderly conduct on capitol grounds). ECF 1.

On December 3, 2021, the Grand Jury issued a seven-count indictment that charged Kelly with 18 U.S.C. § 1512(c)(2) (Obstruction of an Official Proceeding) (Count One), violating 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds) (Count Two), 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds) (Count Three), 40 U.S.C. § 5104(e)(2)(A) (Entering and Remaining on the Floor of Congress)(Count Four), 40 U.S.C. § 5104(e)(2)(C) (Entering and Remaining in Certain Rooms in the Capitol Building)(Count Five), 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building) (Count Six), and 40 U.S.C. § 5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building) (Count Seven). ECF 27.

### **B. Factual Background**

At 1:00 p.m., EST, on January 6, 2021, a Joint Session of the United States Congress convened in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol. As early as 12:50 p.m., certain individuals in the crowd forced their way through, up, and over erected barricades. The crowd, having breached police officer lines, advanced to the exterior façade of the building. Members of the U.S. Capitol Police attempted to maintain order and keep

the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol. At approximately 2:20 p.m., members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to – and did – evacuate the chambers.

***Kelly's Participation in the January 6, 2021 Riot.***

Kelly is a resident of Cedar Rapids, Iowa. ECF 1-1 at 2. Kelly was present in Washington, DC for the “Stop the Steal” rally on January 6, 2021. At the conclusion of the rally, Kelly marched to the U.S. Capitol. After attending the “Stop the Steal” rally on January 6 in Washington, D.C., Kelly marched to the U.S. Capitol with scores of others. When Kelly arrived at the Capitol, he saw rioters on restricted Capitol grounds and other rioters climbing scaffolding set up for the inauguration and the stairs. Kelly joined the rioters and made his way up the stairs. United States Capitol Police (“USCP”) closed-circuit video footage establishes that at 2:40 p.m., rioters shattered a glass Senate fire Door windowpane and opened the Senate Fire Door. The rioters overwhelmed the responding USCP officers. Some rioters forced their way into nearby Senate offices.

At approximately 2:43 p.m., Kelly and other rioters streamed into the breached Capitol. Kelly recorded their confrontation with USCP officers. Kelly also entered the Senate Parliamentarian’s Office and recorded an encounter with an individual in which Kelly stated, “Hey knock that shit off. Don’t destroy this place. This is ours. Dude, knock it off.” At approximately 2:58 p.m., Kelly and others confronted USCP officers near the North Door Appointment Desk. *See* Figure 1.



*Figure 1 – screen capture from a Twitter account depicting Kelly and rioters near the North Door Appointment Desk.*

Kelly and the others chanted, “Whose house? Our house.” *See* Ex. 1 – Twitter | gracyn\_forever 5ff93adc86c51.video.mp4 (“Kelly Twitter video”), <https://archive.org/download/nmu9xcmP9bo57SEGH/nmu9xcmP9bo57SEGH.mpeg4d>; *see also* Figure 1 above.<sup>1</sup> The officers tried to prevent them from advancing further into the Capitol, but they were overwhelmed. Kelly and the others made their way to the Senate chamber. *See* Figures 2 and 3.

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<sup>1</sup> Ex. 1 will be filed pursuant to Local Rule 49(e)(1).



Figure 2 - Kelly and other rioters about to enter the Senate chamber.

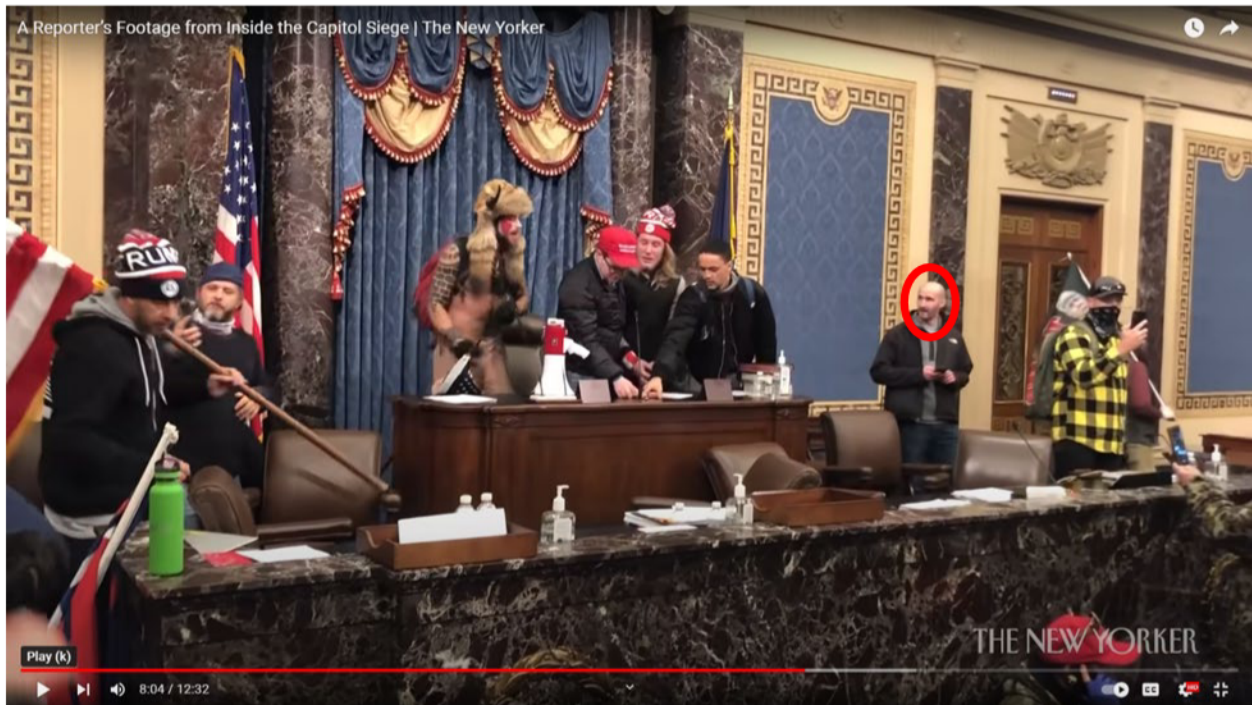


Figure 3 – Screen capture from *A Reporter's Footage Inside the Capitol Siege*. Kelly is pictured on the Senate dais wearing a black jacket and grey sweater.

Kelly stood on the Senate dais and used his cellular phone to record himself examining papers on the desk. He also took photographs of Senate material. Kelly and the others on the dais

said a prayer. At approximately 3:05 p.m., law enforcement officers expelled Kelly and the other rioters from the Senate chamber. At approximately 3:08 p.m., Kelly exited the Capitol and returned to his hotel.

At approximately 6:00 p.m., while wearing the same sweater during the Capitol breach, Kelly was interviewed by a LifeSiteNews.com reporter.<sup>2</sup> The reporter asked Kelly why Kelly entered the Capitol and Kelly responded, “We listened to the President’s speech over at the Ellipse over at the White House and made our way down Constitution and Pennsylvania Avenue.” Ex. 2—LifeSitenews.com interview of Leo Kelly.<sup>3</sup> He told the reporter that by the time he arrived at the Capitol he saw people climbing the scaffolding and climbing up the stairs. *Id.* He further stated, “there wasn't even any barricades to keep us out, like maybe there were before I got there but they were gone by the time I got there.” *Id.* Kelly continued:

(Um) and I wanted to see what was going on so I just kept climbing as far as I could, and you just have to understand that there was so many people out there you couldn't ... you could only move so fast. Like people ... everybody was trying to get up close to the building and you just couldn't ... you couldn't even move for a lot of the time. You had to wait for people to kind of filter up as they ... as different people were ... I don't know if they were opening up new parts of the stairs or something, but, um, eventually I made it up around the building, the Capitol building.

*Id.* The reporter asked Kelly what motivated Kelly to enter the Capitol. Kelly responded:

That ... that's an interesting moment. I just ... I think I just saw it happen and I was like there's something going on here. This is a ... this is a moment in U.S. history. It's ... it's not unlike the days of the beginning of the country. Like, it's just like at

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<sup>2</sup> The About section of LifeSiteNews.com states LifeSitenews.com “is a non-profit Internet news service dedicated to issues of life, family, and many related issues.” LifeSitenews.com, <https://www.lifesitenews.com/about>. Last accessed November 15, 2022.

<sup>3</sup> Exhibit Two, the video recording of Kelly’s interview, LifeSitenews.com, Exclusive: Man who entered Capitol tells his story to LifeSiteNews (Jan. 6, 2021), <https://www.lifesitenews.com/episodes/exclusive-man-who-stormed-capitol-tells-his-story-to-lifesitenews/>, is no longer available on the website. The government has endeavored to accurately transcribed the broadcast interview for the government's response and pursuant to Local Rule 49(e)(1), has provided the Court with a copy of the recorded interview for its review.

... at some point there's enough illegal behavior and there's enough crimes against the Constitution being committed by the elected officials that what are you supposed to do? You know. Nobody in the courts will listen to ... they won't even take a look at the evidence. They just dismiss court cases ... all the election fraud cases on grounds ... on ... ah ... that there's no standing or whatever ... like ... so at some point you reach a point ... how none of my institutions are working. What are you supposed to do?

*Id.* The reporter then stated, "When you woke up this morning, you obviously had no idea you'd be storming the Capitol and breaching the Capitol building and going inside," to which Kelly interjected, "no." and the reporter continued, "You shot some video in there" to which Kelly interjected, "yeah," and the reporter continued, "We're going to show some of that." *Id.* The reporter then showed a video clip from Kelly's cellular phone from inside the Senate chamber that showed rioters celebrating and then panned down to the papers on the dais desk and the contents inside open drawers. *Id.*

Kelly told the reporter that he was inside the Capitol between 30 and 60 minutes and that he saw 100s of people inside the Capitol. *Id.* Kelly further referred to the scene inside the Capitol as "chaos" and that:

Because there would be a group with me and a group of people that were blocked by a line of law enforcement officers, which by the way, in most of my interactions with them were ... they were professional trying to fulfill their duty and the people ... us ... were just ... mostly respectful, as respectful as you can be when you're kind of really pushing in on somebody's space like that. Um but then there would be a line ... us ... there'd be a line of police officers ... or whatever law enforcement and then behind you'll see other people just running around ... it's just absolute chaos.

*Id.* After remarking on the size of the Capitol building, Kelly stated "and it's kind of weird, like you get in there and oh now we're going to go ... you know make our voices heard on ... the floor of the Senate ... or the floor of the House, whatever." *Id.* The reporter then stated, "And you made it all the way to the Senate floor." *Id.* Kelly shook his head in approval and stated, "I did. I did. We said a prayer up there." *Id.* Kelly continued, "we've been betrayed by Congress, been

betrayed by the judicial branch. We've been betrayed by our local governments, our mayors and everything. What are we supposed to do?"

The reporter asked Kelly how Kelly felt about events at the Capitol. Kelly stated he was "conflicted" and that "you violate someone else's space ... "force your way into a building ... in some ways that really feels wrong ... but, that [space] really does belong to us." *Id.* Kelly continued:

[T]hat should only be an absolute last resort ... maybe we shouldn't have done that ... it's just, you come to the end of your rope ... and you get swept up in a movement ... and there's a bunch of people running and doing this ... it's not the logical mind that's working anymore ... you're just reacting to things and, finally, there's a chance that you can be heard ... and, we took that chance ... God will judge us ... perhaps I did something wrong ... I tried to be as respectful as I could while I was in there, while still saying what I felt needed to be said.

*Id.*

On January 8, 2021, LifeSiteNews.com posted a 1 minute, 16 second exclusive clip of Kelly's interview to its Facebook page. Ex. 3 - LifeSitenews.com interview of Leo Kelly, extended clip.<sup>4</sup> Kelly was asked if he thought Antifa was present at the Capitol. *Id.* He said "there was a mixture. *Id.* Most of the people up there were true patriots but I just had the sense that this is an information war and a lot of people are trying to put their spin on things." *Id.* Kelly also referenced entering a Senate office located to his right after he entered the Capitol and discovering individuals "tearing up" the office and "stealing stuff." *Id.* He explained "patriots" told the individuals to stop and that he believed Antifa was present at the Capitol, although he had no proof, and that there were people inside the Capitol, "who did not fit what I expect from the patriotic Trump movement, if that makes sense." *Id.* Local Iowa media also featured Kelly's account of his time inside the Capitol.

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<sup>4</sup> Ex. 3 will be filed pursuant to Local Rule 49(e)(1).



The FBI received numerous anonymous tips identifying Kelly as an individual inside the Capitol unlawfully on January 6, 2021.

On January 18, 2021, law enforcement officers arrested Kelly. At 8:56 a.m., Kelly signed FD-395, an FBI Advice of Rights form and waived his right to remain silent. ECF 67-2 – FBI Advice of Rights, FD-395 form. Kelly then made incriminating statements. Among those statements were that after attending the “Stop the Steal” rally at the Ellipse, he and others marched to the Capitol. ECF 67-3 – Redacted Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 24-25. Kelly described the scene when he and others reached the Capitol as follows:

So then you walk up there and you, we got to the Capitol and by the time I got there, there were already people like way up like, you know, I don't know if you guys have ever been there but you look up the hill and there's this scaffolding which I think is what the bleachers are now. And people had climbed up on that and people had, they were just all over the grounds. And I was just, I wanted to see it.

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You know? And I wanted to get, you know, and so I just followed 'em up and kept walking. And I don't know, when you're in a group like that and you're kind of moving around in a mass, I guess what I would expect is at some point you run up against whatever the building's normal fence would be or something. And I don't remember ever seeing that. Like I assume someone took it out of the way or whatever. I don't know. But you just keep walking and walking and walking, getting closer and closer and closer and there's always thousands more people ahead of you so I just kept going.

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And eventually, yeah, we got up there and there was just thousands of people everywhere and I can't remember. There were some people I actually saw coming out of the building, like regular, just folks. And I guess what's weird s-I [sic] read this. I don't know if it's true but apparently according to the police report in D.C. the, there was people in the building or the building was breached or something like that before (Pause) the President even got done speaking or something like that. Like it's just something like, there's just all this weird stuff that happened around the whole event.

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But by the time I show up there, they're like swarming up the scaffolding and like I mean, you know, I mean maybe we should have known better. I mean possibly. Like, but you're in a group and you just walk and it's just like well what's going on here? I don't know. It's like (Laughing).

*Id.* at 25-26. When asked if he knew of advanced planning to enter the Capitol, Kelly denied having such prior knowledge but stated, "We certainly knew what the schedule was for that day. They were going to certify the, or I can't remember if it's called certify or whatever, the election results, which was why the whole event (VO)."<sup>5</sup> *Id.* at 27. Kelly also explained how he entered the Capitol:

There was a door. I was up in like I don't know, off to the side. Whatever. There's like the middle of the building and then somehow wherever I had flown with the crowd up there. And there was a group of people actually coming out of some doors or windows or something that they had broken. But they were, there was already people coming out by the time I got up there. And then something happened off to my left where there was another door and somebody started, I don't know, hitting it with something or something. I don't know if they were trying to break the window or what. And I do not remember how that door got opened, if the person forced it open or if the police from the inside opened it. Or, I don't know if they were police or what they were but (VO).

*Id.* Kelly made other admissions, including that he did not have a badge or credentials that would allow him into the Capitol, *id.* at 28; agreed with Agent Bronner's characterization that a police line was "breached," *id.* at 30; that the group inside the Capitol significantly outnumbered the police, *id.* at 30; and informed the agents that he and 20-30 people made their way into the Senate chamber, *id.* at 36. Additionally, Kelly identified himself in a YouTube video. *Id.* at 38. When asked if there was anything he wanted the agents to know, Kelly explained, "[the] crowd was not a violent bunch of psychopaths." *Id.* at 44. He blamed the event on the failure of police to stop the group when he said:

Like it wouldn't have taken much to like stopped the group. Now clearly we went up there and we did what we did. But it would not have been, like all you needed

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<sup>5</sup> VO is an acronym for voice over.

was like a few police officers and some actual barricades and it would have just taken the wind out of everybody's sails and, and like we would have just stood around and didn't, like (VO).

*Id.* at 45. When asked if in hindsight he thought his actions were the right thing to do, Kelly said, "No. I don't, actually." And further that, "I don't think I had the, an authorized right to be in that building, you know?" *Id.* at 46.

## ARGUMENT

Kelly seeks an order to prohibit the government from "mention[ing] or allud[ing]" to the following categories of events or evidence related to January 6, 2021:

1. Any news reports during and after January 6, 2021 that mention police personnel that died. Mr. Kelly had no role in that.
2. Any reference to President Trump's (hereinafter "Trump") stop the steal lawsuits, court challenges, or issues raised by Trump's lawyers about the election and outcomes of those lawsuits. This also includes Trump's current suit to challenge the subpoena to testify in front of the House Select Committee investigating the January 6th events. Mr. Kelly is not an attorney and the legal significance of any lawsuits brought by parties, unrelated to Mr. Kelly, to challenge the elections or subpoenas is irrelevant to Mr. Kelly's conduct on January 6, 2021 and should be excluded.
3. Any reference to the proud boys, patriot boys, three percenters or oath keepers. This includes any information regarding the Oath Keepers using a hotel in Virginia to stage weapons in the event that martial law was declared on January 6, 2021. There is not one scintilla of evidence that Mr. Kelly knew of this operation or was a member of any of these groups.
4. Any photos taken from Mr. Kelly's phone that are irrelevant to this case. This may go on a photo by photo basis. Any photographs not related to the events of January 6th including but not limited to Mr. Kelly's personal life.
5. Mr. Kelly's mug shot.
6. References to violence at the West Terrace Tunnel, the breach of the Capitol on the East side at the Rotunda doors, the initial breach at the Senate Wing Doors and any other breach at the Capitol other than the door Mr. Kelly entered through. Mr. Kelly had no role in the breach of any door at the Capitol. He walked in through the Senate Fire Door near S132 unhindered by police through open doors following many other people who entered

inside. Mr. Kelly was not a participant or witness to the breaches of any doors nor was he a witness or participant to violence at the Lower West Terrace Tunnel. This includes the incident involving Officer Fanone being pulled into the crowd. The government should be precluded from making reference to these events or showing in any compilation or other photos the events to which Mr. Kelly was not involved or even aware of during the events of January 6, 2021.

ECF 50 at 1-2. Although Kelly's motion does not cite the federal rules or case law, Kelly seeks to apparently exclude evidence based on relevance and prejudice grounds. The instant motion should be denied because the evidence the government expects to prove at trial is relevant and not unduly prejudicial or otherwise excludable under Federal Rule of Evidence 403.<sup>6</sup>

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

The government does not intend to present evidence such as police officer deaths arising from the January 6, 2021 riot. Likewise, the government does not intend to present evidence regarding the "proud boys, patriot boys, three percenters or oath keepers," as there is no such connection to Kelly nor does the government intend to present irrelevant family photographs recovered from Kelly's cellular phone or an image of Kelly's "mug shot." Additionally, the government does not intend to present evidence of the former President's or his attorneys' efforts to resist compliance with Congressional subpoenas related to the January 6, 2021 riot. However,

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<sup>6</sup> The government will take precautions not to introduce evidence that would be confusing, invite mini-trials, and waste time. Fed. R. Evid. 403.

the government reserves its right to respond to any issues that arise at trial through the presentation of any relevant evidence.

The government will, however, introduce evidence of the former President's pre-January 6, 2021 lawsuits through Kelly's own words as those lawsuits and their failure partially animated Kelly's riotous behavior and go towards the charges in the Indictment, including his corrupt attempts to obstruct an official proceeding, the certification of the Electoral College ballots, in violation of 18 U.S.C. § 1512(c)(2). The government will also seek to introduce a montage of United States Capitol Police ("USCP") closed-circuit video footage of multiple breaches of the Capitol as such evidence is relevant to the charges and also provide context. Therefore, except as specifically noted above, the Court should deny Kelly's motion.

The government expects the evidence will show that Kelly's conduct, like the conduct of hundreds of others he mentioned in his interviews, took place in the context of a large and violent riot. Visual and testimonial evidence about Kelly would necessarily include evidence of his proximity and interactions with other rioters, including his viewing rioters on Capitol Grounds, joining rioters in climbing scaffolding and stairs that lead to both the Senate Wing Door and Parliamentarian/Senate Fire Doors, and his acting as part of the mob as he and others refused to leave the Capitol and pushed against a line of police at the North Desk Appointment Door. Further, testimony of the chaotic atmosphere in the Capitol is relevant to demonstrate the police's inability to gain control the Capitol and stem the delay of Congress's certification of the 2020 election.

Kelly himself spoke extensively during his interview with LifeSitenews.com and during his custodial interview with the FBI agents of the "chaos" in the Capitol, Ex. 2 – LifeSitenews.com interview of Leo Kelly (referencing the group of rioters he roamed throughout the Capitol with and other groups of individuals and the scene as "just absolute chaos"); ECF 67-3 – Redacted

Transcription of Audio Recording: Custodial FBI interview of Leo Kelly (January 18, 2021) at 27 (“And there was a group of people actually coming out of some doors or windows or something that they had broken.”). Kelly’s various descriptions of the chaotic scene were not limited to the Senate Fire Door and included explicit references to the violence ongoing throughout the Capitol.

Therefore, evidence putting Kelly and the mob of rioters into context, such as through a witness testimony or visual evidence of the attack on the Capitol, is probative.

Although probative evidence can also be prejudicial, the government’s accurate characterization of the Kelly’s conduct and the conduct of rioters throughout the Capitol would not create undue prejudice.<sup>7</sup> *See United States v. Roberson*, 21-cr-102 (JDB), 2022 WL 35643 at \*6 (D.D.C. Jan. 4, 2022) (“Rule 403 does not countenance exclusion of evidence because it too effectively suggests that the defendant committed the charged crime.”). Thus, corroborative evidence of that violence from witnesses or CCV footage is relevant and not unduly prejudicial.

### CONCLUSION

For the reasons stated herein, the government respectfully requests that this Court deny Kelly’s motion.

Respectfully submitted,

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<sup>7</sup> Although the government intends to include brief snippets from USCP CCV footage of the Capitol breaches, including the Lower West Terrace, the government intends to carefully introduce evidence to avoid video footage that could unduly prejudice Kelly. For instance, the government does not intend to introduce footage of Officer Fanone “being pulled into the crowd,” *see* ECF 56 at 2, or the deaths of others in or outside the Capitol on January 6, 2021.

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**CERTIFICATE OF SERVICE**

This is to certify that on November 29, 2022, I, the undersigned Assistant United States Attorney, served on copy of the foregoing response to the defendant's motion via CM/ECF on the counsels of record in this action.

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